

**GUIDELINE PROCEDURES FOR THE PLACEMENT OF  
CHILDREN IN THE CUSTODY OF THE DEPARTMENT OF SOCIAL SERVICES  
AT THE INITIATIVE OF THE COURT  
G.L. c. 119, §23C**

Children form strong attachments to their primary caregivers, even when the care is inadequate or harmful. When the child welfare system is forced to intervene on behalf of a child whom the system suspects is being abused or neglected, it is the Judge who must monitor the safety and well-being of these children.

The judge is the gatekeeper of the foster care system. This authority was given to the judiciary by the federal government (Federal Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C., §670 *et seq.*). The court must seek to avoid unnecessarily separating children from their families when this can be done safely. Some out of home placements can be avoided by requiring the Department of Social Services to provide assistance to a family in crisis. When the child must be placed out of the home for safety reasons, the court must take an active role in assuring that reasonable efforts to reunite the child with his or her family have been employed by the Department of Social Services. If the reasonable efforts do not result in family reunification in a timely manner, then federal law mandates that the Department of Social Services focus their efforts on finding the child a permanent home. Judges must actively monitor child welfare cases through Judicial case management and regular court hearings. This monitoring includes oversight of the efforts employed by the Department of Social Services whether the goal is expediting the return of a child to his or her home that is no longer in crisis, or expediting the placement of the child in a stable and loving permanent setting.

**1. Law**

- a. Upon a determination by the judge (hereinafter “Court”) that a child under the age of eighteen is without proper guardianship due to death, unavailability, incapacity or unfitness of the parent or guardian, or upon the consent of the parent(s) the Court may place the child in the custody of the Department of Social Services. G.L. c. 119, §23C.
- b. The Department shall accept, on order of the Probate and Family Court, the responsibility for any child under the age of eighteen who is without proper guardianship due to death, unavailability, incapacity or unfitness of the parent or guardian, or on the consent of the parent(s). G.L. c. 119, §23C.
- c. In a divorce judgment (G.L. c. 208, §28) or pending the divorce judgment (G.L. c. 208, §19), the Court may make such order as it considers expedient relative to the care, custody and maintenance of a minor child and may award custody of the child(ren) to some third person, if it seems expedient or for the benefit of the children.
- d. Upon or after an adjudication or voluntary acknowledgment of paternity, the Court may award custody to the mother or the father or to them jointly or to another suitable person as may be appropriate in the best interest of the child. The Court may order custody to a person who is not a parent if it is in the best interest of the child and if the written consent of the parents (or surviving parent) is filed with the

Court. Custody may also be awarded to a person who is not a parent if, it is in the best interest of the child and both parents (or the surviving parent) are unfit to have custody, or if one parent is unfit and the other files a written consent. G.L. c. 209C, §10.

**2. Filing**

- a. The Order issued by the judge transferring custody to the Department shall contain the following information and the Order shall be made available to the Department:
  - i. The names and addresses of the child, the child's parent(s) and/or legal guardian;
  - ii. The names and addresses of the attorneys representing the parent(s) and/or legal guardian;
  - iii. The name and address of the attorney appointed to represent the child;
  - iv. The type of action and docket number from which the order arose;
  - v. The date for the next hearing;
  - vi. A certification by the court that 'the continuation of the child in the home is contrary to his or her welfare'; and, a certification pursuant to G.L. c. 119, §29C that the Department of Social Services used reasonable efforts to prevent the removal of the child from his or her home. (See part 3.)
- b. Numbers i-v. above can be completed on the "Sua Sponte Order for Transfer of Care and Custody to the Department of Social Services" form. A blank form is included in these materials.

**3. Contrary to the Welfare/ Reasonable Efforts Determination**

- a. Once custody has been granted to the Department of Social Services under G.L. c. 119, § 29C, the court must certify the reasons for the grant of custody. Two forms have been provided for this. They are Contrary to the Welfare/Initial Custody and Reasonable Efforts/Initial Custody. (Interim Trial Court forms 1 and 2).
- b. The Court must determine that continuation of the child in his/her home is contrary to the welfare of that child. In addition to signing the certification the Court must describe the basis for such certification. (Interim Trial Court form 1).
- b. In most cases where the Court grants custody to the Department of Social Services on its own initiative, the court is making a determination that there is an immediate risk of harm or neglect which precludes the provision of preventive services by the Department of Social Services as an alternative to removal. The Reasonable Efforts form provides a checkoff box for this finding. The form also requires the Court to describe the basis for the certification. (Interim Trial Court form 2).
- c. Upon entry of the order, a new case file shall be opened by the person designated in accordance with Uniform Practice Xb to be responsible for tracking child

welfare cases in each division (hereinafter “court”). The case shall be in the name of the child in the adoption docket and be assigned a docket number therein.

**4. Petition**

- a. A petition need not be filed to open and process the case. The *sua sponte* Order issued by the judge will suffice for the petition.
- b. Nothing herein prohibits the Department from filing a petition under G.L. c. 119, §23C for custody of the child. Such a petition shall be entered on the docket and substituted for the *sua sponte* Order as the initiator of the case.

**5. Notice**

- a. The parties shall be given a copy of the Order. The Order shall contain notice to the parties that they may have a right to counsel, if indigent.
- b. If the legal parent(s) or guardian(s) are not parties to the original action, then they shall be given notice.
- c. Notice shall issue in the form of a citation, if the present address of a legal parent or guardian is unknown.
- d. The court shall give notice to the Department of Social Services by telephone and by faxing a copy of the *sua sponte* Order to the Area Legal Office of the Department as soon as practicable.

**6. Appointment of Counsel**

- a. Whenever the Court awards custody of a child to the State, indigent parent(s) are entitled to the appointment of counsel if they have filed an appearance. See, Balboni v. Balboni, 39 Mass. App. Ct. 210 (1995).
- b. The Court shall appoint counsel for the child at the time custody is granted to the Department of Social Services.
- c. An affidavit of indigency is required and a current financial statement must be provided by any parent seeking the appointment of counsel. One of the following determinations in accordance with Supreme Judicial Court Rule 3:10 shall be made:
  - i. The party is indigent;
  - ii. The party is indigent but able to contribute (if the party is able to contribute the Court must state the amount that the party is expected to contribute); or,
  - iii. The party is not indigent.
- d. The scope of the appointment of counsel for a parent is limited to the issue of custody only and does not include the original or any other pending action.

**7. Timing for next hearing -- Parent(s) not present during initial grant of custody**

- a. The case should be set for a status conference within a relatively short period of time.
  - i. If the parents are not parties to the underlying action (i.e., guardianship petition or 209A complaint), a status conference should be held as soon as practicable but no later than two weeks from the initial grant of custody to the Department. (It should be noted that a state intervention action pursuant to G.L. c. 119, §24 requires that the Court hold a hearing within 72 hours of the grant of custody to the Department.)
  - ii. If the whereabouts of the parent(s) is unknown then a status conference should be scheduled for the return date of the citation.
- b. During this status conference, the Court shall:
  - i. Inquire as to the results of the Department's initial assessment of the family;
  - ii. Determine what additional assessments or evaluations, if any, may be required; and,
  - iii. Inquire as to the appropriateness of the child's placement and what, if any, contact is taking place between the child and the family.

**8. Timing for next hearing -- Parents are present during initial grant of custody**

- a. If the parents are parties to the underlying action, a hearing should be held no later than 45 days, preferably within 14 days from the date of the issuance of the *sua sponte* Order.
- b. Any assessments or evaluations ordered during the initial grant of custody shall be completed within this time period.
- c. The Court may consider scheduling a status conference prior to a hearing to obtain the results of the Department's initial assessment of the family and to determine what additional assessments or evaluations, if any, may be required.

**9. The Hearing Process**

- a. The Court shall hear testimony from any witness that it deems appropriate, including, but not limited to, the caseworker assigned to the family.
- b. The Department of Social Services shall present a service plan for the child containing appropriate tasks for the family.
- c. The Department of Social Services shall identify:
  - i. The services, if any, that are needed to keep the child safe within the home;
  - ii. The interim placement for the child that is least restrictive and most family-like;
  - iii. The efforts that were made to make it possible for the child to return safely to his or her parent or guardian and what efforts were made to place the

- child with a relative caregiver;
  - iv. Any expected or anticipated evaluations or assessments;
  - v. The services provided to the child and the child's responsiveness to those services;
  - vi. The services provided to the parent and the tasks required of the parent and the parent's utilization of the services and compliance with the required tasks;
  - vii. The established goal for the child;
  - viii. The appropriateness of that goal; and,
  - ix. An estimated timeline for the completion of the goal.
- d. The judge shall expect that the attorney for the child will, at a minimum address the following issues:
- i. The medical and dental health of the child;
  - ii. The mental and emotional well being of the child;
  - iii. The child's education plan; and,
  - iv. The current and future placement plans of the Department of Social Services.
- e. The Court shall pay particular attention to cases where the use of anti-psychotic medication by the institution where the child is residing is discussed. All parties must be reminded that a full Rogers hearing is required.
- f. In addition to any interventions the Court deems necessary, the judge shall consider the appropriateness of making the following orders:
- i. Parental contact with the child;
  - ii. Child support;
  - iii. Appointment of a guardian *ad litem* to conduct assessment or evaluation of parent and/or child; and,
  - iv. If the Court is concerned about the possible impact on a child from multiple placements prior to being placed in a permanent home, then the Court may consider adding language to the review order that states: "Until the placement of the child into a pre-adoptive home, the child shall remain in the current foster home, except in the case of an emergency. In such event, the Court and all counsel shall be notified of the change in placement immediately. Once the Department has identified a pre-adoptive/permanent home and the child is ready to be moved, all counsel shall be given prior notice." This will allow the counsel for the child to review the placement and bring to the attention of the Court any placement that the attorney believes is not in the best interest of the child.
- g. If the child cannot be returned home in a timely fashion, the Court shall comply with the provisions of G.L. c. 119, §29B to determine the permanency plan for the child and to make any appropriate order as may be in the child's best interest and the provisions of G.L. c. 119, §29C to determine whether the Department of Social Services has made reasonable efforts to make it possible for the child to

return safely to his or her parent(s) or guardian(s).

**10. Orders**

- a. Following each hearing an order shall be entered until the case has been dismissed. The order shall contain, at a minimum, the following information:
  - i. The child's age;
  - ii. The length of time the child has been in care;
  - iii. The child's current placement;
  - iv. The proposed plan of the Department of Social Services; and,
  - v. The date for the next scheduled court event (see, section 11 below).
- b. The Court must enter an order for every child whose case has been scheduled for that hearing date.
- c. The court shall send the order to the Department of Social Services, the attorney for the child, the attorney for the parents.

**11. Next hearing Date or Further Review Date**

- a. The Court shall set a next hearing date and conduct subsequent hearings in accordance with the procedures outlined in section 9 above and when appropriate Trial Court Rule VI - Uniform Rules For Permanency Hearings. The court should coordinate the scheduling of permanency hearings and review hearings when possible.
- b. A next review date needs to be assigned until the award of custody has been vacated, the child has turned eighteen or the case has been dismissed.
  - i. The Department shall send written notice to the Court and all counsel of record when a child turns eighteen and is no longer in the custody of the Department; and,
  - ii. The notice that a child is eighteen or over, and no longer in the custody of the Department shall be docketed and the court shall on its own motion issue a judgment dismissing the petition.
- c. The timing for the next court date.
  - i. The next court date (a date certain) must be tailored to the individual needs of the case and the child.
  - ii. In no event shall the next court date be greater than one year.
  - iii. A one year review shall only be considered when there is no anticipated change in the child's placement and the child is doing well in that placement.